

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JANE MARIE TEAFORD,)	
)	No. CV-10-0282-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DENYING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 15.) Attorney Maureen R. Rosette represents Jane Marie Teaford (Plaintiff); Special Assistant United States Attorney Willy M. Le represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and **DENIES** Defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff protectively filed for disability benefits insurance (DIB) and Supplemental Security Income (SSI) on July 18, 2008. (Tr. 16.) She alleged disability due to depression, anxiety, alcohol dependence in remission, personality disorder, C5-6 fusion, and chronic pain, with an amended onset date of February 1, 2009. (Tr. 64, 162-63.) Benefits were denied initially and on reconsideration. Plaintiff timely requested a hearing before an administrative law

1 judge (ALJ), which was held before ALJ Marie Palachuk on February
2 17, 2010. (Tr. 16, 37-90.) Plaintiff, who was represented by
3 counsel, testified. Medical experts Thomas McKnight, Ph.D., and
4 Arthur Brovender, M.D., and vocational expert Jennie Lawson (VE)
5 also testified. The ALJ denied benefits on March 31, 2010, and the
6 Appeals Council denied review. (Tr. 1-5, 16-31.) The instant
7 matter is before this court pursuant to 42 U.S.C. § 405(g).

8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 A district court's order upholding the Commissioner's
12 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
13 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
14 Commissioner may be reversed only if it is not supported
15 by substantial evidence or if it is based on legal error.
16 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
17 Substantial evidence is defined as being more than a mere
18 scintilla, but less than a preponderance. *Id.* at 1098.
19 Put another way, substantial evidence is such relevant
20 evidence as a reasonable mind might accept as adequate to
21 support a conclusion. *Richardson v. Perales*, 402 U.S.
22 389, 401 (1971). If the evidence is susceptible to more
23 than one rational interpretation, the court may not
24 substitute its judgment for that of the Commissioner.
25 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
26 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,
28 resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner. *Tackett*, 180

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
2 Nevertheless, a decision supported by substantial evidence will
3 still be set aside if the proper legal standards were not applied in
4 weighing the evidence and making the decision. *Browner v. Secretary*
5 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
6 there is substantial evidence to support the administrative
7 findings, or if there is conflicting evidence that will support a
8 finding of either disability or non-disability, the finding of the
9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
10 1230 (9th Cir. 1987).

11 SEQUENTIAL EVALUATION

12 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
13 requirements necessary to establish disability:

14 In evaluating whether a claimant suffers from a
15 disability, an ALJ must apply a five-step sequential
16 inquiry addressing both components of the definition,
17 until a question is answered affirmatively or negatively
18 in such a way that an ultimate determination can be made.
19 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
20 claimant bears the burden of proving that [s]he is
disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

21 The Commissioner has established a five-step sequential
22 evaluation process for determining whether a person is disabled. 20
23 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
24 137, 140-42 (1987). In steps one through four, the burden of proof
25 rests upon the claimant to establish a prima facie case of
26 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
27 920, 921 (9th Cir. 1971). This burden is met once a claimant
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1 establishes that a medically determinable physical or mental
2 impairment prevents her from engaging in her previous occupation.
3 20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the
4 presentation of 'complete and detailed objective medical reports of
5 [the claimant's] condition from licensed medical professionals.'" *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). At step five,
6 the burden shifts to the Commissioner to show that (1) the claimant
7 can perform other substantial gainful activity; and (2) a
8 "significant number of jobs exist in the national economy" which
9 claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v),
10 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
11 1984).
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13 STATEMENT OF THE CASE

14 The facts of the case are set forth in detail in the transcript
15 of proceedings and are briefly summarized here. At the time of the
16 hearing, Plaintiff was 50 years old, single, and living alone. (Tr.
17 62-65.) She has three adult children and an adolescent daughter who
18 was living with the child's father. (Tr. 65.) Plaintiff stated she
19 had graduated from high school and attended four years of community
20 college, during which she took photography classes and early
21 childhood development classes. However, she did not obtain a degree
22 in either subject. (*Id.*) Plaintiff has past work experience in
23 photography, early childhood education, as an in-home care giver, a
24 teacher's aide, and a library assistant. (Tr. 66-69.) She
25 testified she left her last job as a library assistant due to
26 depression. (Tr. 67.) She also testified she had physical
27 limitations due to neck surgery, knee surgery, a tear in her right
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1 shoulder and attendant pain. (Tr. 70-75 She stated she could
2 lift/carry ten pounds, stand a half hour to an hour, walk a mile on
3 flat surfaces, and bend. She could not squat. (Tr. 76-77.)
4 Plaintiff testified she had four and a half months of sobriety as of
5 the hearing date, with one relapse on October 4, 2009. (Tr. 78.)
6 Plaintiff took a variety of medications for her mental and physical
7 conditions. (Tr. 695.) She reported the medication helped her
8 anxiety and moods, and they did not make her lethargic. She stated
9 she could no longer work due to depression symptoms. (Tr. 79.)

10 ADMINISTRATIVE DECISION

11 ALJ found Plaintiff remained insured for DIB purposes through
12 December 31, 2012. (Tr. 16.) At step one, ALJ Palachuk found after
13 the amended onset date of February 1, 2009, there was a continuous
14 12 month period during which Plaintiff did not engage in substantial
15 gainful activity. (Tr. 19.) Before step two, the ALJ stated she
16 reviewed the entire record "irrespective of any drug or alcohol
17 issues." (*Id.*) At step two, she found Plaintiff had severe
18 impairments of "status post, fusion of C5-6 in 2006; tenosynovitis;
19 fracture of coccyx; mild osteoarthritis in the right shoulder; mild
20 osteoarthritis in the right knee; status post fusion in C6-7 in
21 2008; an affective disorder; and polysubstance abuse. (*Id.*)
22 Referencing mental health records, the ALJ found a diagnosed
23 personality disorder was non-severe. (Tr. 20.) She also noted
24 evidence of alcohol abuse that "was a contributing and material
25 factor" to a finding of disability through February 2009, but in
26 light of the amended onset date and Plaintiff's testimony that she
27 stopped using alcohol in June 2009, the ALJ found it was

1 questionable whether a substance addiction would meet the durational
2 requirement of twelve months required for a finding of disability.
3 (*Id.*) Viewing the evidence in a light most favorable to Plaintiff,
4 the ALJ proceeded through the entire sequential evaluation process.
5 (*Id.*)

6 At step three, the ALJ found Plaintiff's impairments, alone and
7 in combination, did not meet or medically equal one of the listed
8 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
9 (Listings). (Tr. 21.) She summarized Plaintiff's testimony and
10 concluded her statements regarding the severity of her functional
11 limitations were not credible to the extent they were inconsistent
12 with the assessed residual functional capacity (RFC). (Tr. 23-24.)
13 At step four, she determined Plaintiff had the RFC to perform light
14 exertional work, with numerous non-exertional restrictions to
15 accommodate physical and mental limitations supported by the record,
16 Plaintiff's credible testimony, and medical expert testimony. (Tr.
17 23-29.) Based on this RFC and VE testimony, the ALJ concluded
18 Plaintiff could not perform her past relevant work. (Tr. 29.) The
19 ALJ proceeded to step five and found Plaintiff could perform jobs as
20 a collator operator and cafeteria attendant. (Tr. 30-31.) The ALJ
21 concluded Plaintiff was not disabled as defined by the Social
22 Security Act. (*Id.*)

23 ISSUES

24 The question is whether the ALJ's decision is supported by
25 substantial evidence and free of legal error. Plaintiff argues the
26 ALJ erred in her evaluation of the medical evidence, specifically
27 the opinions of examining psychologists Scott Mabee, Ph.D., and
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1 Dennis Pollack, Ph.D.; did not give specific and legitimate reasons
2 for rejecting physical limitations assessed in October 2007; and
3 improperly relied on medical expert testimony. (ECF No. 14 at 11-
4 19.) Defendant responds the ALJ's decision is supported by
5 substantial evidence and free of legal error. (ECF No. 16.)

6 DISCUSSION

7 In disability proceedings, the ALJ evaluates the medical
8 evidence submitted and must explain the weight given to the opinions
9 of accepted medical sources in the record. The Regulations
10 distinguish among the opinions of three types of accepted medical
11 sources: (1) sources who have treated the claimant; (2) sources who
12 have examined the claimant; and (3) sources who have neither
13 examined nor treated the claimant, but express their opinion based
14 upon a review of the claimant's medical records. 20 C.F.R. §§
15 404.1527, 416.927. A treating physician's opinion carries more
16 weight than an examining physician's, and an examining physician's
17 opinion carries more weight than a non-examining reviewing or
18 consulting physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587,
19 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
20 1995). The Commissioner must provide "clear and convincing" reasons
21 for rejecting the uncontradicted opinion of a treating or examining
22 physician." *Lester*, 81 F.3d at 830. If the medical opinion is
23 contradicted, the ALJ must articulate "specific" and "legitimate"
24 reasons that are supported by substantial evidence in the record to
25 reject the opinion. *Andrews*, 53 F.3d at 1043.

26 Conflicting medical evidence, the absence of regular medical
27 treatment during the alleged period of disability, and the lack of
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1 medical support for doctors' reports based substantially on a
2 claimant's subjective complaints of pain are "specific and
3 legitimate" reasons for disregarding a treating or examining
4 physician's opinion. *Flaten v. Secretary of Health and Human*
5 *Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair v. Bowen*, 533
6 F.2d 597, 604 (9th Cir. 1989). Where an ALJ determines a treating
7 or examining physician's stated opinion is materially inconsistent
8 with the physician's own treatment notes, legitimate grounds exist
9 for considering the purpose for which the doctor's report was
10 obtained and for rejecting the inconsistent, unsupported opinion.
11 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996). Rejection of
12 an examining medical source opinion is specific and legitimate where
13 the medical source's opinion is not supported by his own medical
14 records and/or objective data. *Tommasetti v. Astrue*, 533 F.3d 1035
15 (9th Cir. 2008). Nonetheless, it is legal error to reject examining
16 medical source opinions because they conflict with testimony of a
17 non-examining medical advisor that is not supported by other medical
18 evidence in the record. *Lester*, 81 F.3d at 830 (opinion of a non-
19 examining physician cannot by itself constitute substantial evidence
20 to justify rejection of examining physician opinion).

21 In addition to acceptable medical sources, the ALJ must
22 consider opinions from "other sources," such as mental health
23 providers and nurse practitioners, as well as non-medical sources.
24 20 C.F. R. §§ 404.1513(d), 416.913(d); *Social Security Ruling (SSR)*
25 06-03p. The ALJ is required to "consider observations by
26 non-medical sources as to how an impairment affects a claimant's
27 ability to work." *Sprague*, 812 F.2d at 1232. Other source opinions
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1 can never establish a diagnosis or disability absent corroborating
2 competent medical evidence. *Nguyen*, 100 F.3d at 1467. The opinion
3 of an acceptable medical source generally is given more weight than
4 that of an other source. 20 C.F.R. §§ 404.1527, 416.927; *Gomez v.*
5 *Chater*, 74 F.3d 967, 970-71. (9th Cir. 1996). However, where factors
6 found in 20 C.F.R. §§ 404.1527(d) and 416.927(d) are established and
7 the other source is shown to have an ongoing treatment relationship
8 and longitudinal understanding of a claimant's impairments and
9 attendant limitations, the other source opinion may be given more
10 weight than that of an accepted medical source. SSR 06-03p. If the
11 ALJ rejects an other source opinion, she is obligated to give
12 specific reasons, germane to that witness. *Dodrill v. Shalala*, 12
13 F.3d 915, 919 (9th Cir. 1993).

14 **A. Medical Evidence of Physical Limitations**

15 Plaintiff asserts the ALJ did not give proper weight to an
16 October 15, 2007, "Return to Work" form enumerating work
17 restrictions when she returned to her library position. (ECF No. 14
18 at 19, 454.) Plaintiff misstates that this report is from a
19 treating physician at Doctor's Clinic. A review of the record shows
20 the relied upon report is from Brandi Desaveur, physician's
21 assistant at Northwest Orthopaedic Specialists, and concerns
22 Plaintiff's treatment for a sacral fracture, for which treatment was
23 closed on December 10, 2007. (Tr. 370.) Further, not only did the
24 ALJ find Plaintiff could not return to her work at the library,
25 because Plaintiff amended her onset date to February 2009, the
26 limitations assessed in 2007 are not probative to the period at
27 issue. *Carmickle v. Comm. of Soc. Sec.*, 533 F.3d 1155, 1165 (9th
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1 Cir. 2008) ("Medical opinions that predate the alleged onset of
2 disability of limited relevance"). Dr. Brovender's medical expert
3 testimony and the ALJ's final physical RFC are supported by other
4 substantial evidence in the record, including Plaintiff's testimony.
5 (Tr. 24-25, 49, 70, 75-77, 586-605.) The ALJ's physical RFC is a
6 rational interpretation of the evidence in the entire record and
7 free of legal error.

8 **B. Medical Evidence of Psychological Limitations**

9 Plaintiff asserts generally that the ALJ improperly rejected
10 treating and examining medical opinions in favor of Dr. McKnight's
11 testimony and conclusions. In arguing that she is "more limited
12 from a psychological standpoint" than found by the ALJ, Plaintiff
13 specifically references: (1) opinions endorsed by Scott Mabee,
14 Ph.D., included in an April 7, 2008, evaluation in which
15 psychological testing was administered, interpreted, and summarized
16 by assessment specialist Amy Robinson, M.S., (Tr. 350-54); (2)
17 conclusions in a psychological evaluation completed by Dennis
18 Pollack, Ph.D., in January 27, 2010; and (3) opinions from
19 Plaintiff's treating therapist at Family Service Spokane (FSS) and
20 Spokane Mental Health provider, Nancy Rider, ARNP. (ECF No. 14 at
21 12-15; Tr. 350-56, 586-88, 666-75, 673, 693.)

22 **1. Dr. Mabee**

23 The report endorsed by Dr. Mabee was written in April 2008,
24 prior to Plaintiff's amended onset date. (Tr. 350-54.) The
25 opinions predate the alleged onset of disability and, therefore,
26 are of limited relevance. *Carmickle*, 533 F.3d at 1165; *Fair*, 533
27 F.3d at 600. In addition, as discussed in more detail below,
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1 Plaintiff confirmed she was abusing alcohol prior to June 2009, and
2 the ALJ found Plaintiff's alcoholism was a contributing factor to
3 disability prior to that time. Therefore, these limitations with
4 the effects of alcohol abuse are not sufficient to establish
5 eligibility to disability benefits. *Parra v. Astrue*, 481 F.3d 742
6 (9th Cir. 2007). Therefore, even if the ALJ failed to give specific
7 and legitimate reasons for discounting this evidence, the error is
8 harmless and the ALJ reasonably gave functional limitations assessed
9 at that time little weight. *Stout v. Commissioner, Social Sec.*
10 *Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

11 **2. Dr. Pollack**

12 In January 2010, Dr. Pollack examined Plaintiff and
13 administered objective psychological tests, the results of which
14 indicated possible neuropsychological deficits; possible
15 exaggeration of symptoms; inconsistencies in Plaintiff's self-report
16 regarding drug use, drug-seeking behavior, and alcohol dependency
17 treatment; and Plaintiff's failure complete the full battery of
18 tests due to her inability to stay awake and focused on the second
19 day of testing. (Tr. 669-71.) In the Mental Medical Source
20 Statement attached to his narrative report, Dr. Pollack found
21 Plaintiff had marked limitations in three areas affecting her
22 sustained concentration, persistence, and pace. (Tr. 673.) At the
23 hearing, the VE testified with these assessed mental limitations, an
24 individual would not be able to sustain work. (Tr. 88-89.)

25 **3. Mental Health Treatment Providers**

26 In 2009 and 2010, Ms. Rider opined Plaintiff had a diagnosis of
27 major depressive disorder with alcohol dependence. (*Id.*; Tr. 594-
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600.) Her opinions are consistent with Dr. Pollack's opinions¹ and Dr. McKnight's testimony that Plaintiff had severe affective disorder under Listing 12.04, addiction to prescribed benzodiazepines, and alcohol dependence, and with Dr. Pollack's diagnoses of major depressive disorder, as well as alcohol dependence in early remission. (Tr. 20, 671.) Ms. Rider routinely observed Plaintiff's inability to focus, vacillating mood issues, and struggles with alcoholism during medication management appointments, and by May 2009, recommended Plaintiff participate in alcohol dependency treatment. (Tr. 595-600.) FSS clinic notes document Plaintiff's ongoing issues with alcohol binging and dependency and treatment for depression during the period at issue. (Tr. 635-56.)

In her final mental RFC determination, the ALJ found Plaintiff would have "sufficient attention and concentration to understand and remember and carry out simple and/or one to two step tasks, but with a limitation of no detailed instruction exceeding the one to two step process" and "would have some difficulty maintaining a normal work schedule with only two days a month of missed work." (Tr. 23.) In explaining her findings, the ALJ gave "significant weight" to Dr. McKnight's testimony because he was a specialist with an understanding of the disability proceedings (as is Dr. Pollack), and because Plaintiff obtained Dr. Pollack's examination to "perform the

¹ Dr. Pollack's diagnosis of somatoform disorder had not lasted more than 12 months at the time of the hearing; thus the ALJ did not err in excluding it from his step two findings. 20 C.F.R. § 404.1509, 416.909.

1 basis of the opinion" rather than for treatment. (Tr. 27.) She
2 also reasoned there is "a possibility that a medical professional
3 may express an opinion in an effort to assist a patient." *Id.*
4 These are not legitimate reasons to reject an examining medical
5 source opinion. *Benecke*, 379 F.3d at 592; *Lester*, 81 F.3d at 831.
6 Further, the ALJ's finding that "the marked limitations opined by
7 Dr. Pollack are not supported by the record as a whole," without
8 more, lacks requisite specificity and is not based on substantial
9 evidence.

10 For example, the ALJ did not reject Dr. Pollack's conclusions
11 or the specific marked limitations in his Medical Source Statement,
12 which were based on objective testing and his observations as an
13 examining specialist. (Tr. 27-28, 672-75.) Rather, it appears
14 there was reliance wholly on Dr. McKnight's summary of the evidence
15 and opinions without referencing what, if any, other medical
16 evidence in the record supports his non-examining conclusions. (Tr.
17 25-28.) This is reversible error. A non-examining medical expert's
18 opinions do not constitute substantial evidence and may not be given
19 more weight than the opinion of a treating or examining doctor
20 unless they are supported by other evidence in the record. *Andrews*,
21 53 F.3d at 1041; see also 20 C.F.R. §§ 404.1527(d)(1),
22 416.927(d)(1).

23 As to Ms. Rider's and the FSS clinician's treatment notes and
24 observations (Tr. 637-58), the ALJ found only that "there is also
25 the possibility a mental health professional expressed an opinion in
26 an effort to help the claimant when Spokane Mental Health opined in
27 October 2009 the claimant was 'unable to engage in substantial
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1 gainful activity by reason of mental disorder for over 12 months.'" (Tr. 27, 676.) A review of the evidence shows the referenced
2 opinion from the mental health provider is a routine "eligibility
3 criteria checklist" completed for purposes of funding, and
4 therefore, of limited probative value for these disability
5 determination purposes. The ALJ's speculative finding is not
6 sufficient to reject probative evidence from treating providers who
7 had a documented, ongoing treatment relationship with Plaintiff.
8 The Commissioner has advised this type of evidence is important in
9 the evaluation of functional effects and must be considered by the
10 ALJ by applying the factors found in 20 C.F.R. §§ 404.1527(d),
11 416.927(d), SSR 06-03p. The failure to do so is reversible error.
12 *Dodrill*, 12 F.3d at 919.

14 Because Dr. Pollack's assessment of marked functional
15 limitations was not properly rejected, his opinions may be credited
16 as a matter of law. *Lester*, 81 F.3d at 834. The VE testified that
17 an individual with the limitations assessed by Dr. Pollack could not
18 sustain employment. (Tr. 88-89.) Therefore, crediting Dr.
19 Pollack's medical source opinions, Plaintiff's mental impairments
20 were disabling. However, where the evidence establishes drug
21 addiction or alcoholism (DAA), "a finding of 'disabled' under the
22 five-step inquiry does not automatically qualify a claimant for
23 disability benefits." *Bustamante v. Massanari*, 262 F.3d 949, 954
24 (9th Cir. 2001).

25 **B. Materiality of DAA**

26 Under the Contract with America Advancement Act of 1996, an
27 individual cannot be considered disabled if DAA is "a contributing
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1 factor material to the Commissioner's determination that the
2 individual is disabled." 42 U.S.C. 423(d)(2)(C). Special statutes
3 and regulations govern disability claims that involve DAA. 20
4 C.F.R. §§ 404.1535(a), 416.935(a). If the ALJ finds a claimant
5 disabled, and there is evidence of DAA, the ALJ should proceed under
6 the sequential evaluation and §§ 404.1535 and 416.935 to determine
7 if the claimant would still be disabled absent the DAA. *Bustamante*,
8 262 F.3d at 955. If found disabled with the effects of DAA, the
9 claimant has the burden in steps one through four of the second
10 sequential evaluation process to prove DAA is not a contributing
11 factor material to her disability. *Parra*, 481 F.3d at 748.
12 Plaintiff must provide competent evidence of a period of abstinence
13 and medical source opinions relating to that period sufficient to
14 establish her alcoholism or drug addiction is not a contributing
15 factor material to her alleged mental impairments and disability.
16 *Id.* at 748-49.

17 Here, the ALJ found initially that substance addiction was a
18 contributing factor material disability, but declined to make a
19 finding of disability because (1) Plaintiff amended her onset date
20 to February 1, 2009; and (2) based on Plaintiff's testimony that she
21 stopping using alcohol in June 2009, it was questionable that the
22 impairment lasted 12 months or more. (Tr. 20.) However, at step
23 two of her decision, rendered on March 31, 2010, the ALJ found
24 Plaintiff had the severe impairment of "polysubstance abuse." (Tr.
25 19.) The ALJ's reasoning regarding the materiality of DAA in this
26 case neither conforms with the DAA analysis required by the
27 Commissioner's regulations and case law, nor is it supported by

1 substantial evidence from the record in its entirety.

2 For example, the ALJ's finding that "there is a question on
3 whether the claimant's alcohol use would be considered a material
4 and contributing factor in the determination of disability" is
5 contradicted by Dr. McKnight's testimony that Plaintiff was addicted
6 to medication, was over-medicated, and had a clear history of
7 alcohol dependence that was in self-reported remission in June 2009.²

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10 ² Regarding Plaintiff's self-report, the ALJ found Plaintiff's
11 statements regarding her limitations were not credible "to the
12 extent they are inconsistent with the [RFC]," and because they were
13 "out of proportion to any objective physical findings." (Tr. 24.)

14 Although this finding is not challenged, *de novo* review indicates
15 the ALJ's credibility determination is erroneous. *Lester*, 81 F.3d
16 at 834; *Cotton*, 799 F.2d at 1407; *SSR* 96-7p. If there is no
17 affirmative evidence that the claimant is malingering, the ALJ must
18 provide specific, "clear and convincing" reasons for rejecting the
19 claimant's testimony regarding the severity of symptoms. *Reddick v.*
20 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998); *Bunnell v. Sullivan*, 947
21 F.2d 341, 345-46 (9th Cir. 1991) (en banc). Other than Plaintiff's
22 reports of suicidal ideation, the ALJ did not specify what self-
23 reported symptoms lacked credibility. Rather, she specifically
24 accepted Plaintiff's statements regarding alcohol abuse, limited
25 periods of sobriety until June 2009, and relapse after 90 days of
26 sobriety. (Tr. 24.) On remand, the ALJ will make new credibility
27 findings sufficiently specific, supported by "clear and convincing"
28 reasons, to permit the court to conclude the claimant's allegations

(Tr. 28-29.) As noted by the ALJ, Dr. McKnight then testified "it is common for people with drug and alcohol issues to understate their problem and make excuses." (Tr. 59.) Noting the lack of objective evidence to establish a period of abstinence, Dr. McKnight testified he "had no idea how [examiners] came to the conclusion that [alcohol dependence] was in remission." (Tr. 58.) He stated he would assume from the record that Plaintiff was still using alcohol and "the impact of the benzodiazepine is a serious problem." He further advised Plaintiff would need a protective payee if benefits were awarded. *Id.* This testimony is inconsistent with the ALJ's findings that DAA is not material to the claimed period of disability. Because of the ambiguity created by Dr. McKnight's testimony that DAA is an ongoing factor in this case and Plaintiff would need a protective payee, and the fact that Plaintiff was unable to complete her psychological evaluation with Dr. Pollack due to an inability to stay awake (Tr. 55, 671), a new psychological examination to assess Plaintiff's mental functioning with and without the effects of alcoholism and medication side effects will be necessary to adequately develop the record. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). Thus, even crediting Dr. Pollack's improperly rejected findings and opinions, remand is necessary for additional proceedings, including a proper DAA analysis. Accordingly,

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is _____
were not arbitrarily discredited. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002).

1 **GRANTED** and the matter is remanded to the Commissioner for
2 additional proceedings consistent this decision, including a new
3 psychological evaluation and proper DAA analysis, pursuant to 42
4 U.S.C. § 405(g).

5 2. On remand, the parties may submit additional medical
6 records that are relevant to the period at issue. The ALJ shall
7 hold a new hearing and obtain new medical expert testimony, if
8 necessary, to address newly obtained psychological testing and
9 evaluation. In light of new evidence, the ALJ shall make new
10 credibility findings supported by specific, "clear and convincing"
11 reasons.

12 3. Defendant's Motion for Summary Judgment (**ECF No. 15**) is
13 **DENIED.**

14 4. Application for attorney fees may be made by separate
15 motion.

16 The District Court Executive is directed to file this Order and
17 provide a copy to counsel for Plaintiff and Defendant. Judgment
18 shall be entered for Plaintiff, and the file shall be **CLOSED.**

19 DATED December 9, 2011.

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21 S/ CYNTHIA IMBROGNO
22 UNITED STATES MAGISTRATE JUDGE
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